No. 96-270

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

AMCHEM PRODUCTS, INC., ET AL.,
Petitioners,

v.

GEORGE WINDSOR, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*
AND
BRIEF FOR *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

STEPHEN A. BOKAT
ROBIN S. CONRAD
NATIONAL LITIGATION CENTER, INC.
1615 H. Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JOHN H. BEISNER*
BRIAN D. BOYLE
EVELYN L. BECKER
TERESA KWONG
O'MELVENY & MYERS LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 383-5300
**Counsel of Record*

Counsel for The Chamber of Commerce of the United States of America

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.3 of the Rules of this Court, the Chamber of Commerce of the United States of America moves for leave to file the accompanying brief as *amicus curiae*.

The Chamber of Commerce of the United States of America (the "Chamber") is the largest federation of business, trade and professional organizations in the United States. The Chamber represents more than 215,000 companies, as well as several thousand trade and pro-

fessional organizations, and state and local chambers of commerce. The Chamber regularly participates as *amicus curiae* in civil cases raising issues of national concern to the business community.

Chamber member businesses often have been, and in numerous cases presently are, defendants in cases initiated by class action complaints. Those cases have asserted allegations on a wide array of matters, such as products liability, securities, tort, and antitrust claims. In some of these putative class actions, the parties may be able to reach a settlement before the district court has decided whether the class should be certified for the purpose of litigating the claims set forth in the complaint. The present case raises the question of how the standards for class certification set forth in Federal Rule of Civil Procedure 23 should be applied in such circumstances.

As set forth in the accompanying brief, there is a long history of courts' taking the parties' voluntarily negotiated settlement into account in deciding whether to certify a class. Given the frequency with which Chamber member businesses are made targets of federal class action complaints, the Chamber has a strong interest in informing the Court of the extent to which the settlement class device is used to resolve class action litigation, and the extent to which any ruling that changes long-standing settlement class procedures might affect the public interest.

Consent was granted by many of the parties, but was refused by Prudential Reinsurance Co. *et al.* and American

Reinsurance Co. *et al.* Accordingly, the Chamber moves for leave to file the accompanying brief as *amicus curiae*.

December 16, 1996

Respectfully submitted,

Stephen A. Bokat
Robin S. Conrad
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H. Street, N.W.
Washington, D.C. 20062
(202) 463-5337

John H. Beisner*
Brian D. Boyle
Evelyn L. Becker
Teresa Kwong
O'MELVENY & MYERS LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 383-5300
**Counsel of Record*

Counsel for The Chamber of Commerce of the United States of America

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BRIEF FOR *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the largest federation of business, trade and professional organizations in the United States. The Chamber represents more than 215,000 companies, as well as several thousand trade and professional organizations, and state and local chambers of commerce. The Chamber regularly participates as *amicus curiae* in civil cases raising issues of national concern to the business community.

Chamber member businesses often have been, and in numerous cases presently are, defendants in cases initiated by class action complaints. Those cases have asserted allegations on a wide array of matters, such as products liability, securities, tort, and antitrust claims. In some of these putative class actions, the parties may be able to reach a settlement before the district court has decided whether the class should be certified for the purpose of litigating the claims set forth in the complaint. The present case raises the question of how the standards for class certification set forth in Federal Rule of Civil Procedure 23 should be applied in such circumstances.

The Third Circuit's rule that the parties' settlement cannot be considered in applying Rule 23's class certification prerequisites is markedly at odds with almost thirty years of judicial tradition in reviewing and approving consensual resolutions of class action settlements without determining, hypothetically, whether the actions could be tried on a class basis. If the Third Circuit's interpretation of Rule 23 is affirmed by the Supreme Court, class actions raising claims embodying some individualized issues would be much less likely to settle in the future, a significant number of pending class action settlements could be disrupted, and attempts could be made to challenge ostensibly final class action settlements. In addition, by eliminating consensual settlement as a practical option in many class actions, an affirmance would put pressure on district courts to disregard, or give short shrift to, the rigorous requirements that Rule 23 imposes on class actions proposed for trial. Accordingly, *amicus* has a strong interest in the outcome of the decision below.

SUMMARY OF ARGUMENT

Given the broad diversity of the Chamber's member businesses, it is not surprising that members do not all share a uniform view of ultimate merits of the settlement class device. On the one hand, businesses well recognize that the existence of the settlement class device may encourage wholly untriable class actions brought for the sole purpose of obtaining large settlements. On the other hand, many businesses have long accepted the practical reality that classwide settlement is often the most efficient and fair way of resolving complex claims brought by numerous persons.

The fact is, however, that the Third Circuit's interpretation of Rule 23 -- in particular, its holding that Rule 23 precludes consideration of the fact and terms of the parties' settlement in determining whether the requirements of subdivisions (a) and (b) of the Rule are met -- flies in the face of the consistent practice of the federal courts since Rule 23 was last amended in 1966. The Third Circuit's recognition that Rule 23(a)'s requirements of "commonality," "typicality" and "adequacy of representation," and Rule 23(b)(3)'s requirements that common questions "predominate" over individual questions and that classwide handling be "superior" to individual adjudication, must be applied rigorously before sanctioning a classwide trial is consistent with the developing views of its sister courts,[1] and is to be applauded. But its rigid view that these

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[1] *See, e.g., Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1080-86 (6th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995).

requirements must be applied to a consensual settlement class as if the case will be tried ignores the fact that Rule 23's prerequisites are designed to safeguard the class action *defendant's* due process rights as much as the rights of absent class members. Where the defendant, as part of a class settlement, proposes to surrender its due process rights to full-fledged litigation, the due process inquiry underlying Rule 23 necessarily is simplified. The Third Circuit failed to appreciate this important respect in which the purposes of Rule 23 scrutiny differ in the case of settlement classes.

Acceptance of the Third Circuit's conclusion that the parties' settlement must be ignored in conducting the certification inquiry would have serious consequences for class litigants and the federal courts. Settlement of "mass tort" and like class claims prior to certification would occur, if at all, only in the unusual situation in which the defendant were willing to concede the certifiability of the action for trial. Many class settlements under judicial review could be disrupted as well. And an affirmance of the Third Circuit's ruling might prompt collateral attacks even to finalized settlements. These considerations strongly counsel in favor of deference to the interpretations of Rule 23 made over the last thirty years by members of the Judicial Conference who created the Rule, rather than allowing the Third Circuit to use judicial fiat to advance its minority position with respect to the viability of settlement classes.[2]

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[2] The Third Circuit's decision arose in the context of objections to the district court's preliminary injunction preventing class members from pursuing their claims in any other court pending the issuance of a final order. The objectors challenged the district court's jurisdiction over the underlying class action, the justiciability of the case, the adequacy of class notice, and the propriety of class certification. *See Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 617 (3d Cir.), *cert. granted*, 116 S. Ct. 379 (1996). This brief addresses only the question on which this Court granted *certiorari*.

ARGUMENT

I. THE THIRD CIRCUIT'S NEW INTERPRETATION OF RULE 23 IS AT ODDS WITH THE LONG-STANDING PRACTICE OF OTHER FEDERAL COURTS.

The question whether a district court presented with a pre-certification settlement must ignore that settlement in applying the standards for class certification is one that has often arisen, and will continue frequently to arise, in a wide variety of cases, the vast majority of which have nothing to do with asbestos litigation. For the past 30 years, parties have negotiated, and courts often have approved, pre-certification class action settlements resolving a wide array of such cases.

Shortly after adoption of the 1966 amendments to Rule 23, district courts began taking pre-certification settlements into account in applying the standards for class certification and certifying classes solely for purposes of settlement. *See, e.g., West Va. v. Charles Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971) (antitrust); *Dorey Corp. v. E.I. duPont de Nemours and Co.*, 1975-2 Trade Cas. (CCH) ¶ 60,576 (S.D.N.Y. 1975) (antitrust); *Badgett v. IBEW*, 21 Fed. R. Serv. 2d 173 (N.D. Ohio 1975) (employment discrimination); *Picower v. Lord*, 1976-77 Fed. Sec. L. Rep. ¶ 95,882 (S.D.N.Y. Feb. 22,

1977) (securities); *Kusner v. First Penn. Corp.*, 74 F.R.D. 606, 607 (E.D. Pa. 1977) (securities), *aff'd mem.*, 577 F.2d 726 (3d Cir. 1978); *Alexander v. NFL*, 1977-2 Trade Cas. (CCH) ¶ 61,730 (D. Minn. 1977) (antitrust); *Valerio v. Boise Cascade Corp.*, 80 F.R.D. 626 (N.D. Cal. 1978) (antitrust and securities; citing 1973 order), *aff'd*, 645 F.2d 699 (9th Cir. 1981). In a number of cases, the courts did so while expressly noting that the class likely could not be certified absent the settlement. *See, e.g., In re Anthracite Coal Antitrust Litig.*, 79 F.R.D. 707, 711 (M.D. Pa. 1978) (antitrust); *Arenson v. Board of Trade*, 372 F. Supp. 1349, 1353-54 (N.D. III. 1974) (antitrust); *City of Detroit v. Grinnell Corp.*, 356 F. Supp. 1380, 1390 (S.D.N.Y. 1972) (antitrust), *aff'd in part, rev'd in part on other grounds*, 495 F.2d 448 (2d Cir. 1974).

Subsequently, various courts of appeals examined the validity of such certifications. In an early landmark decision, Judge Wisdom, writing for the Fifth Circuit, held that certifying a class based on (and for purposes of) the parties' settlement (1) is consistent with the language of Rule 23, (2) accords with the flexibility that is the "hallmark" of that rule, (3) constitutes "an important segment of court flexibility in administering and managing" class actions, and (4) provides advantages to class members that outweigh any perceived risks. *See In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 173-78 (5th Cir. 1979) (citation omitted). Several years later, Judge Friendly, writing for the Second Circuit, concurred with "Judge Wisdom's thorough opinion," rejecting the argument that "a firm prophylactic rule" prohibiting the certification of settlement classes is necessary to address potential collusion. *See Weinberger v. Kendrick*,

698 F.2d 61, 72-73 (2d Cir. 1982).[3] Similar conclusions were reached by the Ninth Circuit, *see Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 632-35 (9th Cir. 1982), and by the Fourth Circuit, *see In re A.H. Robins Co., Inc.*, 880 F.2d 709, 725-48 (4th Cir. 1989).

To be sure, courts and commentators have occasionally raised concerns about possible abuses of settlement classes. As Judge Wisdom recognized, courts must be mindful of the possibility of "collusion, individual settlements, 'buy-offs' where the class action is used to benefit some individual at the expense of absent members, and other abuses." *In re Beef Indus.*, 607 F.2d at 174. In light of such concerns, some courts, while persuaded of the benefits of settlements classes, have urged careful scrutiny of settlement terms and conditions (as well as the procedural history leading up to the settlement). *See, e.g., Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 33-34 (3d Cir. 1971) (court must be doubly careful where negotiation occurs before certification and designation of class); *In re Baldwin United*, 105 F.R.D. 475, 481 (S.D.N.Y. 1984) ("[T]he trial courts 'are bound to scrutinize the fairness of the settlement agreement with even more than the usual care . . . in order

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[3] In *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 464 (2d Cir. 1974), another Second Circuit panel rejected the argument that the district court had erred by certifying the class "for the purposes of settlement and refus[ing] to make the same legal finding for all other purposes." The court both "reject[ed] the initial premise" of this argument -- that such certification was not authorized by Rule 23 -- and held that the value of requiring a certification for hypothetical litigation was "somewhat remote." *Id.* at 465.

to meet the concerns noted in the Manual'") (quoting *Weinberger*, 698 F.2d at 73); *Simer v. Rios*, 661 F.2d 655, 664-66 (7th Cir. 1981) (requiring a higher showing of fairness where settlement negotiated prior to certification).

But while courts all along have been mindful of the potential abuses of settlement classes, the prevailing view from the beginning has been to avoid an "inflexible" construction of Rule 23 that would preclude the practical benefits of settlement. *See* 3 Herbert B. Newberg, CLASS ACTIONS § 5570(c) at 475-76 (1977). Thus, over the past two decades, numerous district courts certified classes for settlement purposes while expressly indicating that the class either certainly, or at least possibly, could not have been certified for purposes of litigation. *See, e.g., In re Silicone Gel Breast Implant Prods. Liab. Litig.*, No. MDL 926, 1994 U.S. Dist. LEXIS 12521 (N.D. Ala. Sept. 1, 1994) (medical products liability); *In re Marine Midland Motor Vehicle Leasing Litig.*, 155 F.R.D. 416, 420 (W.D.N.Y. 1994) (RICO); *In re First Investors Corp. Sec. Litig.*, No. 90 Civ. 7225(MJL), 1993 U.S. Dist. LEXIS 18044, *14 (S.D.N.Y. Dec. 22, 1993) (securities); *Chatelain v. Prudential-Bache Sec., Inc.*, 805 F. Supp. 209, 214 (S.D.N.Y. 1992) (securities); *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 157-58 (S.D. Ohio 1992) (medical products liability); *Smith v. Vista Org. Partnership*, No. 89 Civ. 0048(MJL), 1991 U.S. Dist. LEXIS 10484, *24 (S.D.N.Y. July 29, 1992) (securities); *In re Dun & Bradstreet Credit Serv. Customer Litig.*, 130 F.R.D. 366, 369, 371 (S.D. Ohio 1990) (credit information fraud); *South Carolina Nat'l Bank v. Stone*, 749 F. Supp. 1419, 1426 (D.S.C. 1990) (securities); *Sanders v. Robinson Humphrey/American Express, Inc.*, 1990 Fed. Sec. L. Rep. ¶ 95,315 at 96,492 (N.D. Ga. 1990) (securities); *In re First*

Commodity Corp. Customer Accounts Litig., 119 F.R.D. 301, 314 (D. Mass. 1987) (commodities fraud); *Fisher Bros. v. Phelps Dodge Indus., Inc.*, 604 F. Supp. 446, 450 (E.D. Pa. 1985) (antitrust); *In re Petro-Lewis Sec. Litig.*, 1984-85 Fed. Sec. L. Rep. ¶ 91,899 at 90470 (D. Colo. 1984) (securities); *In re Bendectin Prods. Liab. Litig.*, 102 F.R.D. 239, 240 n.4 (S.D. Ohio) (medical products liability), *mandamus granted*, 749 F.2d 300 (6th Cir. 1984); *In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1390-91 (D. Md. 1983) (antitrust); *In re Cuisinart Food Processor Antitrust Litig.*, 38 Fed. R. Serv. 2d 446, 453 (D. Conn. 1983) (antitrust); *In re Chicken Antitrust Litig.*, 560 F. Supp. 957,960-61 (N.D. Ga. 1980) (antitrust); *In re Armored Car Antitrust Litig.*, 472 F. Supp. 1357, 1371-73 (N.D. Ga. 1979) (antitrust), *modified in part on other grounds*, 645 F.2d 488 (5th Cir. Unit B 1981); *Desimone v. Industrial Bio-Test Labs, Inc.*, 83 F.R.D. 615, 620 (S.D.N.Y. 1979) (securities).[4]

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[4] Numerous other courts have certified classes solely for purposes of settlement without suggesting whether the classes also could have been certified for purposes of trial. Recent examples include *Woodward v. NOR-AM Chem. Co.*, No. 94-0780-CB-C, 1996 U.S. Dist. LEXIS 7372, *41 (S.D. Ala. May 23, 1996) (chemical products liability); *Ruiz v. Stewart Assoc., Inc.*, 167 F.R.D. 402, 404 n.4 (N.D. Ill. 1996) (RICO); *In re Kendall Square Research Corp. Sec. Litig.*, 869 F. Supp. 53, 54 (D. Mass. 1994) (securities); *In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 57, 62 (S.D.N.Y. 1993) (securities); *Breslow v. Prudential-Bache Properties, Inc.*, 1993 Fed. Sec. L. Rep. ¶ 97,693 (N.D. Ill. 1993) (securities); *Wells v. Dartmouth Bancorp., Inc.*, 813 F. Supp. 126, 130 (D.N.H. 1993) (securities); *Whitford v. First Nationwide Bank*, 147 F.R.D. 135, 142-43 (W.D. Ky. 1992) (Magistrate) (lending violations); *Cagan v.*

In perhaps the most recent example of a settlement class, a nationwide class was preliminarily certified for settlement purposes in light of an agreement that would settle claims against a number of chemical manufacturers by hemophiliacs alleging injury from exposure to the HIV virus. *See In re "Factor VIII or IX Concentrate Blood Products" Prods. Liab. Litig.*, Nos. MDL-986; 93-C-7452, Pretrial Order No. 32 (N.D. Ill. Aug. 14, 1996). Notably, a year earlier, the Seventh Circuit reversed an order that had certified essentially the same class for purposes of litigation. *See In re Rhone-Poulenc Rorer*, 51 F.3d 1293.[5]

There is no justification for the Third Circuit's rejection of the federal courts' historical application of Rule 23 at this late stage. Certainly, the due process concerns that apparently influenced the Third Circuit do not justify so rigid an approach. It is true, as the Third Circuit observed, that the requirements of Rule 23(a) and (b) are aimed in significant part at ensuring that classwide litigation is a procedurally fair substitute for individualized adjudication. But the object of Rule 23's concern goes beyond the due process interests of absentee *plaintiffs*; Rule 23(a)'s specifications of "commonality" and "typicality," and Rule

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Anchor Savings Bank FSB, 1990 Fed. Sec. L. Rep. ¶ 95,324 at 96,557 (E.D.N.Y. 1990) (securities); *In re Jiffy Lube Sec. Litig.*, 1989-90 Fed. Sec. L. Rep. ¶ 94,859 at 94,657 (D. Md. 1990) (securities); *In re Electric Weld Steel Tubing Antitrust Litig.*, 1982-2 Trade Cas. ¶ 64,872 (E.D. Pa. 1982) (antitrust).

[5] In another recent example, the Fifth Circuit upheld a nationwide settlement class of persons asserting asbestos personal injury claims against Fibreboard Corporation. *See In re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996).

23(b)'s predominance and superiority requirements, are designed to safeguard the due process rights of class *defendants* as well. *See, e.g., In re American Med. Sys.*, 75 F.3d at 1086 (defendant's due process rights violated where district court failed "to conduct a 'rigorous analysis' into whether [Rule 23] criteria were met" by certifying class without allowing defendant opportunity to submit evidence to respond to the class action complaint); *Chateau de Ville Prods., Inc. v. Tams-Witmark Music Library*, 586 F.2d 962, 966 (2d Cir. 1978) (same). For instance, the important Rule 23(b)(3) requirement that plaintiffs advance some "classwide proof" of the essential elements of their claims, *see Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1012 (D.C. Cir.), *cert. denied*, 482 U.S. 915 (1986), is aimed primarily at protecting the *defendant* from being subjected to classwide liability on proof that is without classwide dimension, *see id.* at 1017-18.

In reaching its conclusion below, the Third Circuit voiced concern exclusively over the due process interests of absentee class members[6] without assigning any importance to the *defendants'* agreement to surrender their due process interests in individualized litigation. A defendant's conditional surrender of its due process interests in

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[6] *See Georgine v. Amchem Prods., Inc.*, 83 F.3d at 631 ("The [typicality] inquiry assesses whether the named plaintiffs have incentives that align with those of absent class members so that absentees' interests will be fairly represented."); *id.* at 632 ("We think that typicality is more akin to adequacy of representation: both look to the potential for conflicts in the class"); *id.* at 633 ("This class action also suffers from serious problems in the fairness it accords to the plaintiffs.").

individualized factfinding wholly eliminates defendant-focused due process concerns from the class certification equation. And while the due process interests of the absent class members must be examined in any event, the availability of settlement terms and conditions to test the fairness of the proposed relief to all concerned parties significantly alters the complexion of this inquiry.

At bottom, the tradition from which the Third Circuit's decision departs makes clear that settlement class actions are not a novelty spawned by the pressure to do something about mass torts in general or asbestos litigation in particular. To the contrary, settlement classes have been used for decades consensually to resolve all sorts of multi-plaintiff claims. Wholesale rejection of the current practice of taking the fact and terms of the parties' proposed settlement into account in applying Rule 23's requirements is simply not justified by the due process concerns enumerated by the Third Circuit. Indeed, as more fully discussed below, acceptance of the Third Circuit's interpretation of Rule 23 at this late stage would have potentially serious consequences for the management of class litigation in the federal courts.

II. AN AFFIRMANCE OF THE THIRD CIRCUIT'S APPROACH COULD THREATEN EXISTING CLASS RESOLUTIONS AND RENDER THE MANAGEMENT OF COMPLEX CLASS LITIGATION MORE DIFFICULT.

An affirmance of the Third Circuit's ruling that the parties' settlement must be ignored in applying Rule 23(a) and (b) would have far-reaching consequences not only for class actions that are currently proposed for settlement, but also for the federal courts' management of complex class

litigation in the future. These consequences counsel extreme caution in rejecting the judicial tradition that has developed around settlement classes since the present version of Rule 23 was put in place, and suggest that so fundamental a change in practice as the Third Circuit's approach ordains should be addressed in the rulemaking process rather than through judicial decision.

To begin with, it should almost go without saying that, were the Third Circuit's approach erected as the law of the land, many class settlements currently undergoing district court review, or review on appeal to the circuit courts, could well be challenged anew.[7] An affirmance of the Third Circuit's ruling in this case would arguably be applicable to class actions -- and all class settlements -- pending at the time of decision. *See Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993) ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."); *see also James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 538-44 (1991). At the very least, such pending settlements

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[7] The presence of objectors dissatisfied with some or all of a class settlement's terms is the usual case. "Because settlement of a class action, like settlement of any litigation, is basically a bargained exchange between the litigants, . . . some or many class members," including named plaintiffs, may object to the terms of the settlement. *Alliance to End Repression v. City of Chicago*, 91 F.R.D. 182, 195, 199 (N.D. Ill. 1981) (citation omitted), *rev'd on other grounds*, 742 F.2d 1007 (7th Cir. 1984) (en banc).

could be subject to a fresh review under Rule 23(a) and (b) with an eye toward whether the plaintiffs' claims could fairly and efficiently be *tried* on a class basis. Doubtless, of course, some of the pending settlement classes might, on close scrutiny, be found to satisfy Third Circuit-style requirements for certification under Rule 23. But the defendants in many such actions would likely be unwilling to concede the propriety of a trial-like certification for fear of a possible rejection of the settlement's substantive terms -- from which a classwide trial would then follow. As a result, any pending settlements formed in actions in which the class defendant has nonfrivolous grounds on which to question the permissibility of class certification for trial could potentially be restored to the adversary calendar.

Even seemingly final settlements could be subject to fresh challenges from disgruntled class members. Absent class members unhappy with the disposition of their claims in recently concluded settlements -- even those that have survived final review -- might try to draw strength for new collateral challenges to those settlements from an affirmance of the Third Circuit's approach. Since this Court's decision over fifty years ago in *Hansberry v. Lee*, 311 U.S. 32 (1940), the permissibility of collateral challenges to class action dispositions on due process grounds has been clear. *Id.* at 40-42. Were this Court to accept the rule pronounced by the Third Circuit in this case, disaffected class members in many "final" class settlements -- not otherwise precluded from raising their own claims[8] -- might try to initiate

[8] Statutes of limitations might pose obstacles for claimants seeking to question settlements concluded long ago. However, claimants who bring their individual litigation within a few years

from raising their own claims[8] -- might try to initiate individual litigation questioning the adequacy with which their litigation interests were represented in the class settlement process. *See generally Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (Due Process Clause "requires that the named plaintiff at all times adequately represent the interests of the absent class members" (citing *Hansberry*, 311 U.S. at 42-43, 45)); *see also Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992) (collateral attack premised on counsel's inadequate representation of class requires inquiry into counsel's performance in prior action), *cert. dismissed*, 511 U.S. 117 (1994).

In addition to threatening to undermine both pending and final class settlements, the Third Circuit's rule would inordinately (and unnecessarily) complicate the management of mass tort, securities, and other pattern litigation in the federal courts. Under the Third Circuit's interpretation, the parties and court in a purported class action would not be permitted finally to proceed with a proposed settlement unless and until the trial court made a formal finding that the class would be suitable for trial on behalf of the putative class. This would be an unlikely prospect in most pattern litigation. As this Court has noted, "[c]ertification of a large class" can enormously "increase the defendant's potential

[8] Statutes of limitations might pose obstacles for claimants seeking to question settlements concluded long ago. However, claimants who bring their individual litigation within a few years of approval of the class settlement they desire to challenge might try to claim the benefit of tolling for the period in which the prior class action was pending. *See American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974).

v. Livesay, 437 U.S. 463, 476 (1978).[9] For that reason, defendants faced with putative class actions under the Third Circuit's regime generally would be unwilling to stipulate or consent to a finding that any class could be certified for purposes of litigation. In the event that a given settlement were ultimately disapproved and the action returned to a trial track, any such settlement stipulation might be cited by plaintiffs as precluding any resistance to a certification order for trial purposes. And even if the settlement were given final approval, a settlement-induced finding by the trial court that class treatment was appropriate could arguably serve as a valuable precedent for future plaintiffs seeking to obtain class certification outside the settlement context. Thus, even where class action defendants believed they could negotiate a reasonable settlement, they would still be obliged to fight class certification exhaustively.

Although, in the long run, the reluctance of class action defendants to settle might discourage the filing of frivolous class action complaints by persons hoping for a quick settlement, in the short term lower courts would need to manage the class actions already filed as if they were heading for trial. And for many such cases, individualized adjudication (or individualized settlements) would be the sole means of resolution under the Third Circuit's rule, given the plaintiff-focused questions of fact and varying state law rules

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[9] Lower courts too have recognized that class actions can present defendants with intolerable financial risks and often deprive defendants of any meaningful opportunity to litigate their defenses to individual claims. *See, e.g.*, *Castano*, 84 F.3d at 746; *In re Rhone-Poulenc Rorer*, 51 F.3d at 1298.

that the typical multi-plaintiff litigation presents.[10] The crisis posed by the filing of unjustified class action complaints would quickly assume calamitous dimensions.

The ultimate consequences of such a shift in the means of resolving multi-plaintiff actions might well be long delays in achieving final resolutions, but an equally probable result would be the distortion of Rule 23's requirements for trial-suitable classes as trial courts attempt to grapple with increasingly insoluble caseloads. Put otherwise, under the Third Circuit's rule, courts might well be pressured to distort the principles for deciding whether cases should be certified for litigation in the cause of alleviating docket congestion.[11] For instance, a court seeking to alleviate the docket crush created by an inability to consider settlement classes might seek to promote settlement of a mass tort

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[10] *See, e.g.*, *Georgine*, 83 F.3d at 624-35; *Castano*, 84 F.3d 734 (decertifying class for litigation of alleged nicotine claims); *In re Rhone-Poulenc Rorer*, 51 F.3d 1293 (decertifying class of hemophiliacs for litigation of HIV exposure claims); *In re American Med. Sys.*, 75 F.3d 1069 (decertifying class for litigation of penile implant claims); *In re Telectronics Pacing Sys., Accufix Atrial "J" Leads Prods. Liab. Litig.*, 168 F.R.D. 203 (S.D. Ohio 1996) (decertifying litigation class); *In re Norplant Contraceptive Prods. Liab. Litig.*, 168 F.R.D. 577 (E.D. Tex. 1996) (denying certification of litigation class).

[11] The staggering number and complexity of mass tort class actions brings extraordinary pressure to bear on the courts, all but forcing judges to push settlement options in order to clear these cases from their dockets. *See Recent Case*, 109 HARV. L. REV. 870 (1996) ("[C]ourts faced with the delay and docket-crowding conditions of [mass tort class actions] tend to encourage settlement.")

action by certifying the class and allowing the case to proceed pell-mell to trial, even though the class does not meet all of Rule 23's requirements. Unfounded and abusive class action filings would likely continue to proliferate in such an environment.

In sum, by potentially undermining existing settlements and making the consensual resolution of class action litigation more problematic, an affirmance of the Third Circuit's decision would exacerbate the inexorable pressures of mass tort litigation on the federal courts.

III. THE DECISION BELOW INAPPROPRIATELY PREEMPTS THE RULEMAKING PROCESS OF THE JUDICIAL CONFERENCE.

Although admittedly a matter of speculation, the Chamber respectfully submits that the Third Circuit's decision to part company with the hundreds of cases over thirty years interpreting Rule 23 to allow settlement classes could have been spawned by concern over class actions that assert frivolous claims, raise issues not worthy of litigation, or otherwise invoke the class action device for purposes never intended. As the Seventh Circuit has recently noted, the sheer magnitude of the theoretical exposure and burdens that any class action creates for a defendant often leaves the defendant with little choice but to pursue settlement. *See In re Rhone-Poulenc Rorer*, 51 F.3d at 1298 ("settlements induced by a small probability of an immense judgment in a class action [are] 'blackmail settlements'") (quoting Henry J. Friendly, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973)). Without question, such cases often yield settlements that accomplish little but the enrichment of the attorneys who filed the complaints.

To the extent that the Third Circuit's decision was motivated by these concerns, the Chamber applauds the intent. Something must be done to curtail attempts to invoke the class action device for purposes never intended by its creators. But the Third Circuit's bid to legislate its preferred changes to Rule 23 by judicial fiat is a disruptive and unauthorized means to that end. The current version of Rule 23 was the mid-1960s handiwork of the Judicial Conference of the United States,[12] and the members of that Judicial Conference have on hundreds of occasions interpreted the rule they wrote as authorizing the settlement class device. Particularly in light of this thirty-year history, a minority of the members of that conference should not be permitted effectively to amend the rule by announcing a radically different interpretation thereof.

If there is any need to reexamine the course that lower courts have charted in interpreting Rule 23 in the settlement context, neither the Third Circuit nor any other court should be allowed to circumvent the rulemaking procedure. At

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[12] 28 U.S.C. § 331, which establishes the Judicial Conference of the United States, provides that "[t]he Conference shall . . . carry on a continuous study of the operation and effect of the general rules of practice and procedure . . . prescribed by the Supreme Court for the other courts of the United States pursuant to law." The statute further provides that "[s]uch changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the Conference from time to time to the Supreme Court for its consideration and adoption, modification or rejection, in accordance with law." The current version of Rule 23 was a product of that process.

present, the Advisory Committee on Civil Rules ("Advisory Committee")[13] has launched efforts to amend Rule 23 to address possible abuses of the class action device. *See Proposed Amendments to the Federal Rules of Civil Procedure*, 167 F.R.D. 559 (1996).[14] Through the Judicial Conference, the Third Circuit (as well as any other court or member of the Bar) is welcome to participate in the Advisory Committee's examination of Rule 23 and any proposed amendments thereto.

Deference to the rulemaking process would offer several important advantages over the adjudicatory change to Rule 23 reflected in the Third Circuit's decision. First, the rulemaking process would allow careful weighing of the substantial policy considerations attendant to taking settlement into

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[13] The Judicial Conference has resolved that a standing Committee on Rules of Practice and Procedure be appointed by the Chief Justice and that five advisory committees be established to recommend to the Judicial Conference changes in the rules of practice and procedure for the federal courts. *See* ANNUAL REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 6-7 (1958). The Advisory Committee on Civil Rules is one of those advisory committees.

[14] The Advisory Committee's proposed amendments include a new Rule 23(b)(4) that effectively would overrule the Third Circuit's position and amend Rule 23 to leave no doubt that settlement classes are authorized. *See id.* at 560, 563. This amendment was proposed in the immediate aftermath of the Third Circuit's decision in *In re General Motors Corp. Pick-Up Tuck Fuel Tank Products Liability Litigation*, 35 F.3d 768 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995), holding that the requirements of Rule 23(a) must be applied without regard to whether the parties have proposed a settlement class.

account in class certification decisions. Importantly, these policy tradeoffs could be weighed in the first instance by "the Judicial Conference and its committees, . . . '[who] are in a far better position to make a practical judgment on [the Rules'] utility or inutility than [the Court].'" Statement of White, J., 61 U.S.L.W. 4390, 4391 (U.S. Apr. 27, 1993) (quoting Statement of Douglas, J., 383 U.S. 1089, 1090 (1966) (Douglas, J., dissenting)). Second, if class action practice is to be changed, an amendment to Rule 23, unlike a judicial pronouncement, would indicate a future date upon which the change would become effective. This would prevent disruption of pending class settlements; the parties would be able to continue negotiations with full understanding of the scope and timing of any changes in existing law. Finally, use of the rulemaking process would avoid the inevitable threat of challenges to the finality of already concluded settlements that would be created by a judicial change in the treatment of settlement classes under Rule 23.

For more than three decades, parties have relied on the federal courts to thoughtfully and carefully consider settlement classes in resolving sometimes extraordinarily complex litigation. The Third Circuit's sudden pronouncement that Rule 23 does not countenance a role for settlement considerations in testing the prerequisites for class certification is less an interpretation of the Rule than a quasi-legislative change in the Rule's imperatives; clearly, concerns such as those expressed by the Third Circuit are best mediated by the rulemaking machinery for the Federal Rules. If members of the Judicial Conference determine that Rule 23 needs to be clarified or changed, an amendment can be pursued to effect the required clarification or change with

minimal disruption to the judicial system and to the expectations of parties in existing class settlements.

CONCLUSION

For the foregoing reasons, the Chamber urges the Court to reverse the judgment of the U.S. Court of Appeals for the Third Circuit.

December 16, 1996

Respectfully submitted,

Stephen A. Bokat
Robin S. Conrad
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H. Street, N.W.
Washington, D.C. 20062
(202) 463-5337

John H. Beisner*
Brian D. Boyle
Evelyn L. Becker
Teresa Kwong
O'MELVENY & MYERS LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 383-5300
*Counsel of Record

Counsel for The Chamber of Commerce of the United States of America